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Supreme Court of the United States

OCTOBER TERM, 1954

No. ...593..

PERPETUAL BUILDING AND LOAN ASSOCIATION, FOR ITSELF AND ON BEHALF OF ALL OTHER SHAREHOLDERS AND THE DIRECTORS OF EQUITABLE BUILDING AND LOAN ASSOCIATION WHO WISH TO BE REPRESENTED AS PLAINTIFFS IN THIS ACTION, PETITIONER,

versus

SERIES DIRECTORS OF EQUITABLE BUILDING AND LOAN ASSOCIATION, SERIES NO. 52, AUGUST KOHN & COMPANY, C. W. HAYNES & COMPANY, INC., GREAT SOUTHERN INSURANCE COMPANY, AND FEDERAL NATIONAL MORTGAGE ASSOCIATION, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statement of Case	2
Reasons for Granting the Writ	3
FNMA as Individual had no Right to Remove the Case	3
FNMA was not an Indispensable Party to the State Suit	6
Conclusion	7

CITATIONS

Cases:

	PAGE
Bond v. Town (D.C.), 25 F. Supp. 157	4
Brown v. Hecht, 78 F. Supp. 540	4
Cable v. Ellis, 110 U. S. 389, 28 L. Ed. 186	4
Gulley v. First National Bank, 299 U. S. 109, 112-113, 57 Sup. Ct. 96, 97, 81 L. Ed. 70	5
Hartwell v. Texas Consolidated Oil Co., 94 F. Supp. 601-611	4
Healy v. Ratta, 292 U. S. 263	7
Order of Railway Conductors of America v. Gorman, 133 Fed. (2d) 273	6, 7
Phelps v. Oaks, 117 U. S. 237	6
Rosecrans v. William S. Lozier, Inc., 142 Fed. (2d) 118, 124	7
U. S. v. Bond (10 Cir.), 108 Fed. (2d) 505	4

Statutes:

	PAGE
28 U. S. Code, Section 1254(1)	2
44 Stats. L. 239-240	4
Title 28, U. S. C., Section 1441 *et seq.*	4
Moore's Commentary of U. S. Judicial Code, page 252	4
43 C. J. S., Sec. 89, page 597	5

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Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

PERPETUAL BUILDING AND LOAN ASSOCIATION, FOR ITSELF AND ON BEHALF OF ALL OTHER SHAREHOLDERS AND THE DIRECTORS OF EQUITABLE BUILDING AND LOAN ASSOCIATION WHO WISH TO BE REPRESENTED AS PLAINTIFFS IN THIS ACTION, PETITIONER,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Perpetual Building and Loan Association, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on November 16, 1954.

OPINION BELOW

The opinion of the Court of Appeals has not been officially reported, but it appears in the Advance Sheets of Federal Reporter 2d of January 17, 1955, at page 1. A copy of the opinion is hereto annexed.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1). Judgment of the Court of Appeals was entered on November 16, 1954.

QUESTION PRESENTED

The question presented is: In an action brought in the State Court by a citizen of South Carolina against other citizens of South Carolina can the Federal National Mortgage Association, the stock of which is wholly owned by the United States, voluntarily intervene in the action in the State Court, and then remove the case to the United States District Court upon the ground that the action is one arising under the laws of the United States.

STATEMENT OF CASE

Since the question raised involves solely the jurisdiction of the District Court we believe a brief statement of the facts will suffice. The gist and purpose of petitioner's complaint was to enjoin the local defendants from interfering with the servicing contract set forth in the complaint. According to the allegations of the complaint these local defendants willfully and maliciously, and without any authority, were attempting to interfere with plaintiff's performance of its contract with the Federal National Mortgage Association. The allegations of the complaint plainly show that the controversy is one between the plaintiff and the local defendants as to who was entitled to perform the

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duties of "seller" under the Servicing Contract. Any decree which the State Court might have entered in the case would not have affected the Federal National Mortgage Association's (hereinafter called the FNMA) properties or rights as owner and purchaser, under the terms of said contract. In other words, any decree the Court could enter would not require the FNMA to continue either the plaintiff or any other person as its servicing agent. FNMA, in spite of the pending action in the State Court, was at perfect liberty to cancel the contract or to take any other action it saw fit irrespective of the temporary restraining order.

Plaintiff did not sue FNMA and had no controversy with it. The controversy, insofar as FNMA was interested in it, was of its own seeking.

REASONS FOR GRANTING THE WRIT

The Court of Appeals here holds that FNMA, merely because it is a federal corporation, can voluntarily intervene in an action in the State Court between citizens of the state in which the action is brought and in which no relief is sought against FNMA and remove the case to the District Court merely because FNMA claims that its property rights are affected by said suit, which, in fact, is not the situation.

This is a question of particular importance because the decision of the Court results in the petitioner being deprived of its right to try its case in the State Court and the decision is in conflict with settled principles of general law, as well as the decisions of this and other courts.

FNMA AS AN INTERVENOR HAD NO RIGHT TO REMOVE THE CASE

The opinion of the Court of Appeals deals at some length with the fact that FNMA did not waive its right to

remove by intervening. While the petitioner took this position in the District Court no such question was raised in the Court of Appeals, as the briefs filed by the appellant will show.

In its opinion the Court relied upon the decision in *Bond v. Tom* (D. C.), 25 F. Supp. 157, affirmed, *U. S. v. Bond* (10 Cir.), 108 Fed. (2d) 505, as authorizing the intervenor to remove. In that case the United States intervened and under the provisions of Section 3 of the Act of Congress of April 12, 1926 (44 Stats. L. 239-240), properly removed the case to the District Court. This act of Congress gave the United States the right to intervene and Section 3 of the Act clearly gave the Government the right to remove the case to the Federal Court because this particular act expressly authorized the United States to remove when it intervened. We respectfully submit that this act has no applicaion to a federal corporation. In order for a federal corporation to remove it must bring itself under the provisions of the general removal statute. Title 28, U. S. C., Section 1441 *et seq.*

The decision of the Court is in direct conflict with the decision of this court in *Cable v. Ellis,* 110 U. S. 389, 28 L. Ed. 186, where the Court said:

> "He (the intervenor) took his place by intervening in the suit subject to all the disabilities that rested at the time on the party in whose stead he is to act. * * * and whatever would bar a removal of suit before he intervened will bar him afterwards, even though by his intervention he may have raised a separate controversy."

See *Brown v. Hecht,* 78 F. Supp. 540; *Hartwell v. Texas Consolidated Oil Co.,* 94 F. Supp. 601-611, and Moore's Commentary on U. S. Judicial Code, page 252.

The petitioner's complaint does not set forth a cause of action arising under the laws of the United States and hence was not removable on that ground.

Petitioner in its complaint is seeking, under the State law, to enjoin any interference with or any attempt to induce a breach of the contract set forth in the complaint.

It is a familiar rule that injunctive relief will be granted "to restrain third persons singly or in combination from unlawfully inducing the breach of a lawful contract by one of the parties thereto when it will result in irreparable injury to the other, irrespective of the fact that defendant is solvent; nor is it essential that the contract should be of such a nature that specific performance could be decreed." 43 C. J. S., Sec. 89, page 597.

The decision of the Court of Appeals in holding that the action is removable as one arising under the laws of the United States is in conflict with the decision of this court in *Gulley v. First National Bank,* 299 U. S. 109, 112-113, 57 Sup. Ct. 96, 97, 81 L. Ed. 70.

It is true, as the Court of Appeals held, that a suit against a corporation which is wholly owned by the United States is a suit arising under the laws of the United States and removable on that ground. But here the suit was not against FNMA, and it only became a party by its voluntary action.

In its complaint petitioner asserts no rights arising under the Constitution or any laws of the United States. That the respondents may have some defense based on the construction or application of some law of the United States, or the fact that it may be very likely in the course of the litigation that a question under the laws of the United States may arise, is not sufficient to make an action removable as one arising under the laws of the United States.

FNMA WAS NOT AN INDISPENSABLE PARTY TO THE STATE SUIT

The plaintiff's complaint, when properly construed, clearly shows that FNMA was not an indispensable party to the cause of action alleged in plaintiff's complaint. Any decree the Court could enter would not require FNMA to continue either Equitable or Perpetual as its servicing agent. In other words, it was at perfect liberty to cancel the contract or take any other action it saw fit irrespective of the temporary restraining order. The Court permitted FNMA to be made a party, not because it was indispensable to the action brought by plaintiff, but it was granted the right to intervene as a necessary party upon its own petition so as to defend its alleged agents' rights to service the mortgages, and through that, its alleged right to cancel the contract with Equitable. The controversy so far as the FNMA was interested in it, was of its own seeking; and as its rights could not be concluded by a judgment against the other defendants, FNMA was not in a position to insist that the plaintiff should forego its legal right to proceed against these other defendants. Under such circumstances it is respectfully submitted that FNMA was not an indispensable party to plaintiff's suit.

The decision below is in conflict with the decision of this court in *Phelps v. Oaks*, 117 U. S. 237, and the decision of the Court of Appeals for the Eighth Circuit in Division 525, *Order of Railway Conductors of America v. Gorman*, 133 Fed. (2d) 273.

In the *Phelps case* this Court held that the jurisdiction of the court which had been properly acquired could not be divested by the intervention of a defendant, whose presence would otherwise defeat the jurisdiction of the court. The same principle is applicable to the present case because the suit as it stood before the intervention of the FNMA was

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not become remova-
obviously not removable and hence did not e FNMA.
ble by the voluntary intervention of the
way Conductors of
In the Division 525, *Order of Railwa* point out that the
America case the Court was careful to p mplaint against the
plaintiffs asserted no rights in their comp jurisdiction of the
intervening defendant and that the jur ed by the action of
Court, once acquired, could not be ousted
the defendant seeking affirmative relief.

arly indicates that
The Court of Appeal's opinion clear holly without merit
it thought the petitioner's claim was whol in concluding that
and this seems to have influenced them in Court rather than
the case should be tried in the Federal C petitioner's claim
the State Court. Plainly, the merits of p o remand.
should not be considered on a motion to r

nnot, of course, be
"The merits of plaintiff's claim cann *crans v. William S.*
determined on motion to remand." *Rosecra*
Lozier, Inc., 142 Fed. (2d) 118, 124.

is the thought that
Also implicit in the Court's opinion is may remove a case
a federal corporation, as an intervenor, ma ourt when an ordi-
from the State Court to the Federal Cour
nary citizen could not.

CONCLUSION

federal law which
This case presents a question of fed elow effects a dras-
is of general importance. The decision belo ed by this Court in
tic departure from the principle declared
Healy v. Ratta, 292 U. S. 263, where the C e Court said:

> "Due regard for the rightful i l independence of
> state governments, which should actuat uate federal courts,
> requires that they scrupulously confin fine their own jur-
> isdiction to the precise limits which ich the statute has
> defined."

It is respectfully submitted that the petition for writ of certiorari should be granted.

EDWARD W. MULLINS,
902 Palmetto Building,
Columbia 1, S. C.

February, 1955.

APPENDIX

United States Court of Appeals

FOURTH CIRCUIT

No. 6881

PERPETUAL BUILDING AND LOAN ASSOCIATION, FOR ITSELF AND ON BEHALF OF ALL OTHER SHAREHOLDERS AND THE DIRECTORS OF EQUITABLE BUILDING AND LOAN ASSOCIATION WHO WISH TO BE REPRESENTED AS PLAINTIFFS IN THIS ACTION, APPELLANTS,

versus

SERIES DIRECTORS OF EQUITABLE BUILDING AND LOAN ASSOCIATION, SERIES NO. 52, AUGUST KOHN & COMPANY, C. W. HAYNES & CO., INC., AND THE GREAT SOUTHERN INSURANCE COMPANY AND FEDERAL NATIONAL MORTGAGE ASSOCIATION, APPELLEES.

ARGUED OCT. 13, 1954

DECIDED NOV. 16, 1954

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

DOBIE, Circuit Judge.

This case presents a rather complicated picture of varied litigation between numerous parties.

The Federal National Mortgage Association (hereinafter called FNMA) is a wholly owned agency of the United

States, organized under an Act of Congress, Title 12 U. S. C. A. § 1716, engaged in the business of purchasing servicing and selling mortgages which are guaranteed by the Administrator of Veterans Affairs or insured by the Federal Housing Commissioner. In the servicing of its mortgages, FNMA enters into written agreements with various persons for the collection of the mortgage payments and for the performance of such other duties in connection with these mortgages as are required by the agreements. For these services the servicer receives a servicing fee of ½ of 1% based upon the amount of mortgage payments received.

In early 1952, FNMA had a servicing agreement with the Perpetual Building & Loan Association, (hereinafter called Perpetual), under which Perpetual was servicing approximately three hundred mortgages involving a principal amount of in excess of $1,400,000. On June 3, 1952, the mortgages being serviced by Perpetual were transferred by FNMA to the Equitable Building & Loan Association (hereinafter called Equitable) for servicing after such date, under the terms of a written servicing agreement entered into by FNMA with Equitable, dated June 3, 1952.

The agreement between FNMA and Equitable among other things provided in Paragraph No. 7:

> "The Association on 30 days' written notice to Seller (of the mortgage), may terminate the servicing duties which Seller agrees to perform in Part B hereof, as to one or more specific Mortgages or as to all Mortgages; and the Association may elect at any time to withdraw a delinquent Mortgage from further servicing. If Seller violates any provision of this Agreement (except paragraph 1 in Part B), the Association, on one day's written notice, may terminate the servicing duties which Seller agrees to perform in Part B hereof. In any case in which the Association terminates the servicing duties for cause, the Association shall, at its option, be released from its obligation to purchase any Mortgage pursuant to any contract made by the Association and Seller."

Thereafter, FNMA in exercising its right to terminate the servicing duties with Equitable, and in accordance with

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Paragraph 7 of the written agreement between the parties, gave Equitable a thirty-day notice of termination, dated March 18, 1954, the termination to be effective at the close of business April 23, 1954. FNMA, thereupon, made arrangements with August Kohn & Co., C. W. Haynes & Co., Inc., and the Great Southern Insurance Company to service these mortgages. Notices were directed by FNMA to each of the three hundred odd mortgagors directing them to make payments on their said mortgages on and after May 1, 1954, to the new servicer designated in the notice.

Then, after the servicing duties were transferred by FNMA to the three new servicers, effective April 23, 1954, Charles F. Cooper began a series of amazing court actions, all (it is alleged by the appellees) for the purpose of harassing FNMA and attempting to prevent or delay the transfer of the servicing duties desired by FNMA.

On April 24, 1954, the day after the servicing duties had been terminated with Equitable, an action was filed in the name of Equitable by Cooper, as its attorney in the Richland County Court against Frank H. Greer, an agent of FNMA and August Kohn & Company, C. W. Haynes & Co., Inc. and the Great Southern Insurance Company. Equitable appeared before the Richland County Court and stated that the suit was brought without its authorization and the Court ordered that its name be withdrawn as party plaintiff.

The Court permitted Equitable to withdraw as plaintiff and upon motion of Cooper, the Court substituted Cooper and Paul C. deTreville as plaintiffs, although Cooper and Paul C. deTreville had never had any contractual relations with FNMA, and there was no showing that they had a right to claim any interest in a servicing agreement with FNMA. On the following day, again on motion of Cooper, the Court permitted the name of Perpetual to be substituted as the plaintiff on the claim that Perpetual was the real party in interest, and Equitable was made party defendant. Previous to this substitution of parties, the Court had issued a rule to show cause and a temporary restraining order, without notice, enjoining the defendants from collecting payments on the mortgages.

Immediately after the granting of the order of substitution, Frank H. Greer filed his petition to remove the case to the United States District Court on the ground that he was an agent of the United States Government and was being sued in that capacity. This case became Civil Action No. 4251 in the District Court. Thereafter, FNMA moved in the District Court to be made a party defendant, alleging that it was the real party in interest and a necessary party. Permission to intervene was granted.

Perpetual then filed a motion to remand. Equitable filed its motion to be dismissed as party defendant, upon the grounds that no cause of action was stated against it and that the action commenced by Cooper was without Equitable's authority or permission. Frank H. Greer and FNMA filed answers and counterclaims, and thereafter Equitable filed its answer and reply to the counterclaims, reserving its rights under its former motion to be dismissed.

Upon a hearing on the motion to remand in Civil action No. 4251, the District Court found that the action was one against an agency of the United States and was properly a matter for the jurisdiction of the Federal Court. The District Court also found that the restraining order was improvidently issued by the Richland County Court, that the litigation of the right of FNMA without its appearance in that action in the Richland County Court, was improper and the District Court ordered that the restraining order be dissolved.

The District Court also determined that because no amended complaint had been served after Perpetual had been made party plaintiff and Equitable had been made a party defendant, there was no cause of action stated against any of the defendants. The Court, therefore, dismissed the action as to all parties.

Notwithstanding the District Court's decision as announced in open court that the litigation was an action against an agency of the United States, was properly a matter for the jurisdiction of the Federal Court, and that the litigation without FNMA as a party defendant was improper, the present action was instituted in the Richland County Court on May 24, 1954, by Cooper as attorney for

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Perpetual and others as plaintiff. Cooper not only failed to name FNMA as a defendant, as Judge Timmerman had expressly held should be done, but he also eliminated the name of Frank H. Greer, the agent of FNMA, for the purpose (it is alleged by appellees) of defeating the jurisdiction of the Federal Court. The present action, Civil Action No. 4311, is almost identical, except as to parties, with the action previously considered and dismissed by the Federal Court. Appellant alleges in the present action that "unauthorized employees" of FNMA were attempting to interfere with the agreement between FNMA and Equitable, to the detriment of the United States and of FNMA and of the plaintiffs as stockholders in Equitable. The former suit was incorporated by reference in appellant's present complaint. Also, notwithstanding the fact that the Federal Court ruled on May 21, 1954, that this was an action against the United States and involved property of the United States, the plaintiff, through Cooper, filed the action on May 24, 1954, and secured an order from the Richland claim of the plaintiff was made adversely to FNMA's inizing Perpetual to collect mortgage payments due and owing to FNMA, and enjoining the defendants from interfering with such collections.

Immediately upon the institution of this present action, August Kohn & Co., C. W. Haynes & Co., Inc., and Great Southern Insurance Company filed a petition for removal on the ground that they were being sued in their capacity as agents of an agency of the United States Government. Motion to remand (filed by the plaintiff) was granted by Judge Wyche. Immediately upon the remand, on June 4, 1954, FNMA petitioned the Richland County Court to be made a party defendant on the ground that the plaintiff, without legal right, had asserted control over the three hundred-odd mortgages, of a face value in excess of $1,400,000 which were the property of FNMA, and that the claim of the plaintiff was made adversely to FNMA'S interest in these mortgages. The Richland County Court found that FNMA was a necessary party and permitted the intervention.

On the same day, June 14, FNMA filed its petition to remove the case to the United States District Court for the Eastern District of South Carolina, on the ground that it was an agency of the United States as defined in Title 28, Section 451, U. S. C. A., and was involved in a controversy arising under the laws of the United States, and that if the relief prayed for in the complaint were granted, it would be damaged in an amount exceeding the sum of $3,000.

On June 16 the plaintiff filed a traverse to the petition for removal, and moved to remand on the grounds:

(1) That FNMA by moving to intervene in the Richland County Court had waived its right to removal.

(2) That the petition for removal was fatally defective in that only one of the several defendants and none of the original defendants, had signed it.

(3) That the United States District Court was without jurisdiction to determine the issues made by the pleadings.

On June 15, the day before the plaintiff served and filed its motion to remand and traverse of the petition, FNMA filed its answer alleging, among other things, that plaintiff's action had seriously interfered with the servicing of the mortgages, and that the mortgages were being depreciated in value because of late payments. The answer alleged, moreover, that FNMA's property rights had been damaged in the sum of $100,000.

On June 24, ten days after FNMA was permitted to intervene, FNMA and the servicer defendants filed an amended petition to remove, in which all defendants joined with the exception of the fictitious "Series Directors of Equitable Building and Loan Association, Series 52."

All of the pleadings and orders in both the first case, Civil Action No. 4251, and in the present case, Civil Action No. 4311, were before Judge Timmerman when the matter was heard on June 24, and fully argued.

On June 25, Judge Timmerman signed the order from which this appeal is taken. After reciting the various steps taken in the case, the order recites that FNMA was a necessary party, and the only real party in interest, that plain-

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tiff's failure to name FNMA as a party was patently for the purpose of circumventing the jurisdiction of the United States Court, and of litigating matters already adjudicated in the former action, and that the joinder of others as defendants who were but mere agents of FNMA, would not prevent removal.

Under this involved and complex situation, we are called on to decide two questions: (1) was the removal of the case proper; and (2) if so, did the District Court err in dissolving the injunction granted by the State Court. Since we think the District Judge decided both these questions correctly, the judgment of the District Court must be affirmed.

1. Perpetual contends that FNMA waived its right of removal by intervening in the State Court. We find no merit in that contention. The motion of FNMA to intervene here was clearly an appearance for a special purpose only.

> "Special appearances by the defendant, not going to the merits, to protect his property against preliminary and summary proceedings, when time is essential, are held not to be waivers (of the right of removal), such as for the purpose of contesting an attachment, resisting the appointment of a receiver, or *seeking to dissolve a preliminary injunction.*" (Italics added.)

Dobie on Federal Procedure, 353-354.

And see, *Atlanta, K & N. Railway Co. v. Southern Railway Co.*, 6 Cir., 131 F. 657; *Champlain Construction Co. v. O'Brien*, C.C., 104 F. 930; *Freeman v. Butler*, C.C., 39 F. 1.

This question was squarely decided in *Real Estate Loan Co. v. Brown*, D.C., 23 F. (2d) 329, in an excellent opinion by District (afterwards Circuit) Judge Sibley. His words are as true and applicable in the instant case as they were there, 23 F. (2d) at page 331:

> "When this property was seized thus by the receiver, its owner was as much forced to make an appearance touching it as if the sheriff had served it with process. It is true the appearance was in form by intervention, and not by answer; but the intervention

was wholly defensive, seeking no benefit from the proceeding, and asking of the court only to be let alone. Intervener prayed to be made a party defendant, and the prayer was allowed by the court. In substance it was a defendant, and as much so in form as the circumstances permitted. * * *

"Looking at the substance of the matter, I hold Lane Cotton Mills Company to be a defendant within the meaning of the removal statute, having a separable controversy, entitling it to remove the suit to the United States court, and the motion to remand will be overruled."

In the instant case, the control of FNMA over its property had been completely taken out of the hands of FNMA by the State Court injunction and, according to FNMA, had been placed in the hands of a person not authorized to exercise such control. In *Bond v. Tom,* D.C., 25 F. Supp. 157, affirmed *United States v. Bond,* 10 Cir., 108 F. (2d) 504, District Judge Kennamer said, 25 F. Supp. at page 158:

"This is a suit to quiet title to eighty acres of land in Creek County, and was instituted in the State District Court of that county. The United States intervened, and * * * properly removed the cause to this court."

And, in *Snow v. Texas Trunk Railroad,* C.C., 16 F. 1, 2, Circuit Judge Pardee stated:

"* * * intervenors were proper parties to the litigation, and that as they had done all they could to become parties, and had been wrongfully refused the right by the state court, they were parties sufficient for the purpose of removing the case, if otherwise they had the right to remove the case."

See, also, *Lehman v. Spurway,* 5 Cir., 58 F. (2d) 227, 229; 3 Moore, Federal Practice (1938), p. 3505, ch. 101, § 101.06.

2, 3. The next objection to the removal, which we also think is without merit, is the failure of all the defendants to join in the removal petition. To this objection there are at least two answers. First, all the defendants did join in

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an amended removal petition which was allowed by the District Court; *Kinney v. Columbia Savings & Loan Association,* 191 U. S. 78, 24 S. Ct. 30, 48 L. Ed. 103; *Torquay Corporation v. Radio Corporation of America,* D.C., 2 F. Supp. 841. The defendant, "Series Directors of Equitable Building and Loan Association, Series No. 52" may be utterly disregarded; for there is nothing in the record to show the existence of any such juristic person or persons. Second, since the suit in the State Court directly affected the property of FNMA, FNMA was an indispensable party to the litigation in the State Court. We also think that, as to FNMA and the plaintiffs, there existed a separable controversy; and, in such cases, the party to the separable controversy (here FNMA) may alone file the removal petition.

4. The ground of removal here is that the case involves a federal question. Since FNMA is a corporation organized under an Act of Congress and is wholly owned by the United States, a suit against FNMA arises under the laws of the United States and is, therefore, removable. *Federal Deposit Insurance Corporation v. George-Howard,* 8 Cir., 153 F. (2d) 591, certiorari denied 329 U. S. 719, 678 S. Ct. 53, 91 L. Ed. 623; *Sabin v. Home Owners' Loan Corporation,* 10 Cir., 147 F. (2d) 653, certiorari denied 326 U. S. 759, 66 S. Ct. 96, 90 L. Ed. 456. See, also, *In re Dunn,* 212 U. S. 374, 29 S. Ct. 299, 53 L. Ed. 558

5. The dissolution of the temporary restraining order issued *ex parte* by the State Court was a matter peculiarly in the discretion of Judge Timmerman. The record, we think, clearly discloses that in dissolving this injunction he was not guilty of any abuse of discretion. On the contrary, his decision was amply warranted by the record before him. See, *Central Hanover Bank & Trust Co. v. Callaway,* 5 Cir., 135 F. (2d) 592; *Jackson v. South Carolina Colored State Fair Association,* 109 S. C. 283, 96 S. E. 116; *Bailey v. Town of Clinton,* 88 S. C. 118, 70 S. E. 446.

For the reasons stated, the judgment of the District Court is affirmed.

Affirmed.

United States Court of Appeals

FOURTH CIRCUIT

No. 6881

Perpetual Building and Loan Association, for itself and on behalf of all other shareholders and the directors of Equitable Building and Loan Association who wish to be represented as plaintiffs in this action, Appellants,

versus

Series Directors of Equitable Building and Loan Association, Series No. 52, August Kohn & Company, C. W. Haynes & Co., Inc., and The Great Southern Insurance Company and Federal National Mortgage Association, Appellees.

Appeal from the United States District Court for the Eastern District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

November 16, 1954.

ARMISTEAD M. DOBIE,
United States Circuit Judge.

FILED
NOV. 16, 1954.

R. M. F. WILLIAMS, JR.,
Clerk.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Argument	12
Conclusion	20

CITATIONS

Cases:

American Bank & Trust Co. v. *Federal Reserve Bank of Atlanta*, 256 U. S. 350	16
Baldwin v. *Traveling Men's Association*, 283 U. S. 522	15
Bankers Trust Co. v. *Texas & P. Ry. Co.*, 241 U. S. 295	16
Barney v. *Latham*, 103 U. S. 205	18
Cable v. *Ellis*, 110 U. S. 389	18, 19
Chicot County Drainage District v. *Baxter State Bank*, 308 U. S. 371	15
Division 525, Order of Railway Conductors of America v. *Gorman*, 133 F. 2d 273	18
Dunn, Matter of, 212 U. S. 374	16, 19
FDIC v. *George-Howard*, 153 F. 2d 591, certiorari denied, 329 U. S. 719	16
Federal Intermediate Credit Bank v. *Mitchell*, 277 U. S. 213	16
Gulley v. *First National Bank*, 299 U. S. 109	18, 19
Jackson v. *Irving Trust Co.*, 311 U. S. 494	15
Kalb v. *Feuerstein*, 308 U. S. 433	15
Machine Tool & Equipment Corp. v. *R. F. C.*, 131 F. 2d 547	16
Northern Ind. R. R. Co. v. *Michigan Central R. R. Co.*, 15 How. 233	13

337690—55——1

Cases—Continued Page

Osborn v. *Bank of United States*, 9 Wheat. 738.. 16
Pacific Railroad Removal Cases, 115 U. S. 1..... 16
Phelps v. *Oaks*, 117 U. S. 236..... 18
Puerto Rico v. *Russell & Co.*, 288 U. S. 476..... 16
Sabin v. *HOLC*, 147 F. 2d 653, certiorari denied, 326 U. S. 759..... 16
Shields v. *Barrow*, 17 How. 130..... 13
Stoll v. *Gottlieb*, 305 U. S. 165..... 15
United States v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506..... 15

Statutes:

48 Stat. 1252 (as amended), 12 U. S. C. 1716... 5
28 U. S. C. 451..... 2, 17
28 U. S. C. 1441..... 2, 16, 17
28 U. S. C. 1441(a)..... 3
28 U. S. C. 1441(b)..... 3
28 U. S. C. 1441(c)..... 3
28 U. S. C. 1442..... 3
28 U. S. C. 1442 (a)..... 3, 17
South Carolina Code of Laws, Sec. 10–219..... 11

Miscellaneous:

F. R. C. P. 24..... 8
Restatement, Judgments, Sec. 1..... 14

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 593

PERPETUAL BUILDING AND LOAN ASSOCIATION, FOR ITSELF AND ON BEHALF OF ALL OTHER SHARE-HOLDERS AND THE DIRECTORS OF EQUITABLE BUILDING AND LOAN ASSOCIATION WHO WISH TO BE REPRESENTED AS PLAINTIFFS IN THIS ACTION, PETITIONER

v.

SERIES DIRECTORS OF EQUITABLE BUILDING AND LOAN ASSOCIATION, SERIES NO. 52, AUGUST KOHN AND CO., C. W. HAYNES AND CO., INC., GREAT SOUTHERN INSURANCE CO., AND FEDERAL NATIONAL MORTGAGE ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT FEDERAL NATIONAL MORTGAGE ASSOCIATION IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of South Carolina (R. 10–13) is unreported. The opinion of the Court of Appeals

for the Fourth Circuit (Pet. App. 1a–9a) is reported at 217 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1954 (Pet. App. 10a). The petition for a writ of certiorari was filed on February 14, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether respondent Federal National Mortgage Association, an agency of the federal government, by intervening as a defendant in petitioner's state court litigation, waived its right to remove the proceeding to the appropriate federal district court.

STATUTES INVOLVED

Sections 451, 1441, and 1442 of Title 28 of the United States Code, in pertinent part, provide:

> § 451. Definitions.
> As used in this title:
> * * * * *
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.
> § 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of a State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

§ 1442. Federal officers sued or prosecuted.

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the

United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * * *

STATEMENT

Petitioner, Perpetual Building and Loan Association, a South Carolina corporation, commenced this action in a South Carolina state court, claiming, *inter alia,* that employees of Federal National Mortgage Association (FNMA) had illegally terminated a FNMA mortgage servicing contract in which Perpetual asserted an interest (R. 3–6). Instead of bringing suit against FNMA, a wholly owned federal government agency, petitioner named as defendants the newly appointed FNMA servicing agents, and sought an injunction to prevent them from acting in that capacity. On the day the suit was filed, the state court granted petitioner a temporary restraining order (1) forbidding the newly named agents from continuing to service certain mortgages owned by FNMA and (2) appointing petitioner to act in their place (R. 2–3). FNMA was then granted leave to intervene in the state court action so as to enable it to protect its property rights in the mortgage payments which, under the state

court's order, were to be collected, *pendente lite,* by petitioner (R. 17–18; 7–8).

FNMA immediately removed the case to the United States District Court for the Eastern District of South Carolina (R. 1–2). In that court, FNMA moved to vacate the state court's temporary restraining order (R. 8) and petitioner moved to remand the action to the state court (R. 9). The district judge, on the basis of a record which included the pleadings and orders in an earlier suit involving the same dispute, entered an order (1) dissolving the temporary restraining order, and (2) denying petitioner's motion to remand (R. 10–13). Petitioner appealed from this order and the Court of Appeals unanimously affirmed (Pet. App. 1a–10a).

The detailed facts relating to the issuance of the challenged district court order may be summarized as follows:

1. *Federal National Mortgage Association (FNMA) and its Mortgage Servicing Contracts.* FNMA is a wholly owned corporation of the United States, organized under an Act of Congress, 48 Stat. 1252 (as amended), 12 U. S. C. 1716, to purchase, service, and sell mortgages which are guaranteed by the Administrator of Veterans Affairs or insured by the Federal Housing Commissioner. In servicing its mortgages, FNMA enters into written agreements with various qualified persons or corporations who collect

the mortgage payments and perform other duties in connection with the mortgages, as prescribed by the servicing agreements, in exchange for a servicing fee of one half of one per cent of the mortgage payments collected.

On June 3, 1952, FNMA entered into a servicing contract with Equitable Building and Loan Association (R. 20), a South Carolina corporation in which petitioner Perpetual claims to be a substantial stockholder (R. 3). This contract related to approximately 300 mortgages whose principal sum exceeded $1,400,000 (R. 17). The written servicing agreement between FNMA and Equitable, contained, *inter alia*, the following provision, which provided for a right of termination by FNMA (see Pet. App. 2a):

> The Association, on thirty-days' written notice to Seller [*i. e.*, Equitable] may terminate the servicing duties which Seller agrees to perform in Part B hereof, as to one or more specific Mortgages or as to all Mortgages; and the Association may elect at any time to withdraw a delinquent Mortgage from further servicing. If Seller violates any provision of this Agreement (except paragraph 1 in Part B), the Association, on one day's written notice, may terminate the servicing duties which Seller agrees to perform in Part B hereof.

Thereafter, pursuant to its rights under this provision, FNMA gave Equitable a thirty-day notice of termination, dated March 18, 1954, to be effective on April 23, 1954. Arrangements were then

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made with respondents August Kohn a
Haynes and Co., Inc., and Great So
ance Co., to assume the servicing of the
under a new set of servicing agreements
were sent by FNMA to each of the 30
directing them to make payments on
gages after May 1, 1954 to the new se
nated in that notice (R. 21).

and Co., C. W.
uthern Insur-
ese mortgages
ts, and notices
0 mortgagors
n their mort-
ervicer desig-

2. *The First Suit.* The day after
arrangement with Equitable had been
Charles F. Cooper,[1] allegedly as a
Equitable, filed an action in the Rich
Court of South Carolina against
Greer (an agent of FNMA), Augus
Co., C. W. Haynes and Co., Inc.,
Southern Insurance Co. (R. 26–29).
land County Court immediately issue
rary restraining order and an order to
why a permanent restraining order
be issued to prevent the named defen
collecting any of the mortgage payme
tion or from doing anything which w
fere with Equitable's "continued hand
mortgage loans and accounts for the F
tional Mortgage Association in the
said plaintiff is doing and has done
execution and effective date of said
(R. 29–30).

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attorney for
land County
Frank H.
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and Great
The Rich-
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would inter-
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Federal Na-
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l contract"

On the same day Equitable appea
ared in the

[1] Mr. Cooper is president of petitioner Perpe
etual (R. 7).

Richland County Court, by its president J. Donald Dial, to challenge the institution of the action, since Equitable had neither authorized nor consented to the bringing of the suit, and to request that the action be dismissed, since Equitable recognized the authority of FNMA to cancel its servicing agreement (R. 35). Instead of dismissing the action the county court ordered an amendment of parties, naming Equitable as an additional defendant and substituting Charles F. Cooper and Paul C. deTreville as plaintiffs (R. 30–31), even though the complaint made no allegation whatsoever as to any injury to these new plaintiffs. On the following day, once again on motion by Mr. Cooper, the county court substituted for Messrs. Cooper and deTreville the name of Perpetual Building and Loan Association as plaintiff (R. 31–33).

Immediately thereafter, Frank H. Greer (the agent of FNMA) filed a petition in the United States District Court for the Eastern District of South Carolina to remove the case to that court (R. 37) on the ground that he was being sued in his capacity as an agent for the United States Government. A short time later, FNMA filed a motion in the District Court to be made a party defendant under F. R. C. P. 24 alleging that it was a necessary party and the real party in interest, and permission to intervene was granted (Pet. App. 4a). Perpetual then filed a motion to remand. After a hearing held May 21, 1954, the district judge ruled that

the action was one against an agency of the United States and was therefore properly a matter for the jurisdiction of the federal court (R. 38), and determined that the restraining order issued by the Richland County Court was improvidently granted, since "the litigation of the rights of Federal National Mortgage Association without its appearance in that action in the Richland County Court is repugnant" (R. 39). Since the complaint originally filed had never been amended so as to state a cause of action in favor of Perpetual, the District Court dismissed the action (R. 39–40), entering its order of dismissal May 25, 1954.

3. *The Second Suit.* Apparently disregarding the District Court's determination that FNMA was an indispensable party to the action, Mr. Cooper filed a new complaint in the name of Perpetual, for itself and purportedly on behalf of others, in the Richland County Court on May 24, 1954, but without joining FNMA or its agent Frank H. Greer as defendants. The new complaint (R. 3–6) was almost identical to that in the previous action, except as to parties.[2] In addition to the deletion of FNMA's agent Greer from the list of defendants, the new complaint stated it was "on behalf of all other share-

[2] The theory of the complaint appears to be a shareholder's derivative suit on behalf of Equitable. However, Equitable was not joined as a party plaintiff or defendant even though the corporation is almost always considered an indispensable party to such an action.

holders and the directors of Equitable Building and Loan Association who wish to be represented as plaintiffs in this action" and added as parties defendant "Series Directors of Equitable Building and Loan Association, Series No. 52."

Once again, the president of Equitable, J. Donald Dial, filed an affidavit in the county court disclaiming any interest by Equitable or its directors in this action; his affidavit (R. 16–17) stating that "according to his information and belief no other director of Equitable Building and Loan Association has authorized the institution of this suit, nor do any of them wish to be represented as plaintiffs herein." The affidavit further stated that the corporate structure of Equittable does not provide for Series Directors and that "the designation as Series Directors of Equitable Building and Loan Association, Series No. 52 is spurious, fictitious and without substance neither identifying nor describing any person, persons, firm or corporation" (R. 16–17). The Richland County Court again issued an immediate restraining order, this time, however, authorizing Perpetual to collect the mortgage payments due and owing to FNMA and enjoining the defendants from interfering with such collections (R. 2–3).

Upon the institution of the second suit, the named defendants, with the exception of the fictitious Series Directors, filed a petition for removal to the federal district court on the ground that they were being sued in their capacity as agents

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of an agency of the United States Government, but the District Court found the removal improper and remanded to the Richland County Court (Pet. App. 5a). Thereupon, on June 4, 1954, FNMA petitioned the Richland County Court to be made a party defendant in accordance with South Carolina procedure, South Carolina Code of Laws, Section 10–219, stating that the action affected mortgages which then were the property of FNMA (R. 17). After a hearing, the county court, on June 14, 1954, determined that "the Federal National Mortgage Association is a necessary party" and granted the motion to intervene (R. 18).

Immediately upon being admitted as a party defendant, on June 14, 1954, FNMA filed a petition to remove the case to the United States District Court for the Eastern District of South Carolina on the ground that FNMA is an agency of the United States Government and that the controversy is one arising under the laws of the United States (R. 1). An amended petition for removal was subsequently filed by all defendants, except the fictitious Series Directors, and allowed by the District Court (R. 25–26; Pet. App. 9a). On June 15, 1954, FNMA filed its answer to the complaint (R. 19–24), and on June 16, 1954, Perpetual filed a motion to remand the action to the Richland County Court (R. 9).

This time the District Court determined that the removal was proper and that the restraining

order issued by the Richland County Court was without basis and should be dissolved (R. 10–13). The District Court concluded that "Federal National Mortgage Association was forced to go into the State Court proceedings to protect its property rights and is a defendant within the meaning of the Removal Statute and is entitled to bring the case into this court"[2a] (R. 11–12). On appeal, the Court of Appeals for the Fourth Circuit affirmed. With respect to the questions presented by the petition for certiorari, that court determined that FNMA had not waived its right of removal by intervening in the state court and that the case involves a federal question which serves as a basis for the removal (Pet. App. 1a–9a).

ARGUMENT

An examination of the proceedings below shows that petitioner has twice sought judicial interference with contracts between FNMA and the other respondents and, in this action, an order authorizing petitioner to act as the servicer of FNMA's mortgages without that agency's authorization or permission. It is clear in each

[2a] Petitioner's unsupported claim that FNMA's property rights are not affected by this suit (Pet. 3) is patently erroneous. This was likewise recognized by the Court of Appeals, which noted that "control of FNMA over its property had been completely taken out of the hands of FNMA by the State Court injunction and, according to FNMA, had been placed in the hands of a person not authorized to exercise such control" (Pet. App. 8a).

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proceeding that FNMA was an indispensable party since the relief sought, and temporarily granted by the state court, prevented FNMA from using mortgage servicers which it had selected and, in the second suit, forced FNMA to utilize petitioner as its sole servicer for the mortgages in question. Cf. *Shields* v. *Barrow*, 17 How. 130; *Northern Ind. R. R. Co.* v. *Michigan Central R. R. Co.*, 15 How. 233. Yet, in each case, petitioner attempted to exclude FNMA from the proceedings. Regardless of petitioner's technical objections, the ultimate result of this case can only be the recognition of the government agency's standing to intervene in this litigation as a necessary party, and its right to have the temporary restraining order vacated—the conclusions reached by both federal courts below.

1. As the District Court stated in denying petitioner's motion to remand (R. 12): "* * * the only real party in interest as a defendant is Federal National Mortgage Association, and it should have been made a party defendant from the inception of the case, and plaintiff's omission was patently to circumvent the jurisdiction of this Court, and to further litigate matters already adjudicated."

On the facts of this case, petitioner is in no position to challenge the validity of the removal of its second action. The propriety of the removal was finally settled by the District Court's decision on this question in the first proceeding,

where the suit was removed by FNMA's agent, Greer, on the basis that FNMA was the real party in interest. It is fundamental to judicial procedure that the entry of judgment by a court precludes any collateral attack upon determinations leading to that judgment by the parties to that action. See *Restatement, Judgments,* Sec. 1. Thus, in this case, petitioner Perpetual, the substituted plaintiff in the first suit, is prevented from attacking the first judgment, which could only have been challenged by an appeal taken in that suit to the Court of Appeals for the Fourth Circuit. Instead of taking such an appeal, petitioner attempted by this new and substantially identical action in the Richland County Court to avoid the force of the District Court's decision by making artificial and fictitious changes (R. 16–17) in the designation of defendants. However, after admission of FNMA as a party defendant in the second suit, the parties involved and the alleged cause of action were identical to those in the first suit which had been previously dismissed by the District Court.[3] It is therefore clear that, to the extent that petitioner sought and seeks to relitigate in its second state court proceeding the

[3] There was, of course, the addition of the fictitious "Any Other Directors of Equitable Building and Loan Association Who Wish to be Plaintiffs" and "Series Directors of the Equitable Building and Loan Association, Series No. 52." Since the president of Equitable stated in his uncontroverted affidavit that no such persons exist and both courts below

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issues resolved in its first case, it is barred by the doctrine of *res judicata*. Thus, it is precluded from here relitigating the removability of this suit to the federal district court.

This conclusion is required even though the issue as to the propriety of removal is a jurisdictional question, for this Court has repeatedly announced that the doctrine of *res judicata* applies to a court's determination of its jurisdiction. *Baldwin* v. *Traveling Men's Association,* 283 U. S. 522; *Stoll* v. *Gottlieb,* 305 U. S. 165. Indeed, the same result would be required even if the jurisdictional issue had not been explicitly litigated and ruled upon in the first action (R. 38–40). *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371; *Jackson* v. *Irving Trust Co.,* 311 U. S. 494. It is true that in a few instances collateral attack has been allowed upon a jurisdictional determination when grave policy considerations were considered to outweigh the otherwise accepted principles. *E. g., Kalb* v. *Feuerstein,* 308 U. S. 433 (state interference with federal bankruptcy proceedings in face of clear statutory prohibition); *United*

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concluded this to be the fact, the addition of these fictitious parties does not effect ordinary rules of *res judicata.*

It should be noted that, even if the formal identity of parties between the first and second state court actions had not been established by intervention, no different result would be required under the applicable principles of *res judicata.* As the courts below recognized, the real controversy here at all times has been between petitioner and FNMA, the two real parties in interest (R. 12; Pet. App. 9a).

States v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506 (entry of judgment against the United States in face of the strong constitutional protection of sovereign immunity). No such overriding policy argues for collateral attack here; rather, the application of the rules of *res judicata* are especially appropriate in this case, in view of the District Court's decision that petitioner's second action in the Richland County Court was patently intended to circumvent the jurisdiction of the federal court and its previous decision (R. 12).

2. With respect to petitioner's contention that the removal was improper, even assuming that it could be raised in this case, the decision below is clearly correct. A suit by or against a government corporation wholly owned by the United States arises under the laws of the United States for the purpose of removal jurisdiction under 28 U. S. C. 1441, *supra*, pp. 2–3. *Machine Tool & Equipment Corp.* v. *R. F. C.*, 131 F. 2d 547 (C. A. 9); *Sabin* v. *HOLC*, 147 F. 2d 653 (C. A. 10), certiorari denied, 326 U. S. 759; cf. *FDIC* v. *George-Howard*, 153 F. 2d 591 (C. A. 8), certiorari denied, 329 U. S. 719.[4] This doctrine, stemming from *Osborn* v. *Bank of United States*, 9 Wheat. 738, although congressionally narrowed at times with regard to particular types of cor-

[4] See also *Pacific Railroad Removal Cases*, 115 U. S. 1; *Matter of Dunn*, 212 U. S. 374; *Bankers Trust Co.* v. *Texas & P. Ry. Co.*, 241 U. S. 295; *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta*, 256 U. S. 350.

porations (see *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 485), has complete vitality where, as here, the United States owns all of the corporation's stock. See *Federal Intermediate Credit Bank* v. *Mitchell*, 277 U. S. 213.

In addition to removal jurisdiction under 28 U. S. C. 1441, it should be noted, as pointed out by the District Court (R. 12), that alternative authority for removal may lie in 28 U. S. C. 1442 (a) (1), *supra*, pp. 3–4, since FNMA is an agency of the United States as defined by 28 U. S. C. 451, *supra*, p. 2.

3. Petitioner argues that FNMA's intervention in the state court proceedings acted as a waiver of its right to remove the case. But, as was noted by both courts below (R. 11–12; Pet. App. 7a–8a), intervention in the state action was FNMA's only means of protecting its receipts on its mortgages and preserving its servicing contracts with the other defendants. FNMA's purpose in intervening was to achieve this protection, not to waive any rights. Removal proceedings, which rounded out the protective course, were begun the same day that intervention was allowed.[6]

Petitioner also contends that FNMA was not an indispensable party to the state suit, in the face of contrary decisions by the District Court

[6] Upon intervention, FNMA had the necessary status of defendant for the purpose of 28 U. S. C. 1441. Examination of the cases shows that obtaining the status of defendant by intervention has never been treated as preventing the intervenor-defendant from invoking removal procedure.

(on two separate occasions) and the Court of Appeals (R. 12, 39; Pet. App. 9a). The District Court concluded not only that FNMA was a necessary and indispensable party but, indeed, that FNMA was the only real defendant in interest (R. 12). The money being collected by petitioner under the state court restraining order concededly belongs to FNMA, and although petitioner contends that the state order has no effect on FNMA's right to contract, it is obvious that the restraining order prevented FNMA from using the mortgage servicers which it has selected.

Moreover, the question whether FNMA is an indispensable party or the only real party in interest would have relevance only if the basis for the removal petition were diversity of citizenship. Cf. *Barney* v. *Latham,* 103 U. S. 205. Here, where the basis of removal was not diversity, it is sufficient that FNMA was a proper party, an issue on which there can be no question.

4. Finally, petitioner relies upon three decisions of this Court and a decision of the Court of Appeals for the Eighth Circuit as directly conflicting with the opinion below, *viz., Cable* v. *Ellis,* 110 U. S. 389; *Gulley* v. *First National Bank,* 299 U. S. 109; *Phelps* v. *Oaks,* 117 U. S. 236; *Division 525, Order of Railway Conductors of America* v. *Gorman,* 133 F. 2d 273 (C. A. 8). The *Phelps* and *Gorman* cases stand for the well-established proposition that once a case has been

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validly removed to a federal court for diversity of citizenship, the court will not lose jurisdiction over the case by admitting additional parties whose citizenship would have destroyed the essential diversity before removal. Neither case makes any reference to the right of an intervenor-defendant to remove a cause, or to the alleged lack thereof. *Cable* v. *Ellis* ruled that a substitute party (not an independent intervenor) who was admitted to a state proceeding several years after its inception and after it has been through numerous state courts had no greater right to remove than his predecessor who had long since lost that right. And in *Gulley* v. *First National Bank* this Court specifically recognized that federal incorporation was a ground for federal jurisdiction where the United States holds more than one-half the stock (299 U. S. at 113) and stated that although the "charter cases" were to be treated as exceptional, within their special field, "there was no thought to disturb them" (299 U. S. at 114).[6] None of the four cases relied upon is authority for the position urged by petitioner.

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[6] In the *Gulley* case, the court repeated the oft applied rule that a cause is not removable unless the necessary allegations of the complaint alone establish the district court's jurisdiction. That proposition has no application to the present case in which the action, as modified by the order granting intervention, creates a federal question by seeking relief from a government corporation, FNMA. It should be noted that courts take judicial notice of FNMA's status as a government corporation although that fact is not specifically pleaded. Cf. *Matter of Dunn*, 212 U. S. 374.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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